UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 10

GARDA WORLD SECURITY	
CORPORATION d/b/a GARDA CL	
ATLANTIC, INC.,)
Employer,)
• •) Case No. 10-RC-15788
and)
INTERNATIONAL UNION, SECURITY,	
POLICE AND FIRE PROFESSIONALS OF)
AMERICA (SPFPA),)
Petitioner.	
	_)

EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS AND RECOMMENDATIONS

I. INTRODUCTION

Pursuant to Section 102.69(f) of the Board's Rules and Regulations, the Employer Garda World Security Corporation d/b/a Garda CL Atlantic, Inc. submits these exceptions to Hearing Officer Neale K. Sutcliff's November 3, 2010 Report on Objections and Recommendations concerning the Employer's objections to the conduct of an election held July 21, 2010. For the reasons stated herein, the Board should sustain the objections and set aside the election.

II. PROCEDURAL HISTORY

The Employer provides armored car and other cash logistic services to clients throughout the country. The International Union, Security, Police and Fire Professionals of America filed a petition to represent the Employer's driver/messenger guards at its Smyrna, Georgia facility on May 26. The Employer and the Union entered into a Stipulated Election Agreement, approved

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¹ All dates referenced herein are to 2010 unless otherwise indicated.

by the Regional Director, on June 23. Pursuant to the agreement, the Board conducted a secret ballot election on July 21. Board Agent Kerstin Meyers conducted the election.

The tally of ballots following the election showed that of the 79 eligible voters, there were 30 votes cast for, and 29 votes cast against, the Union, with no challenged ballots. Twenty eligible voters did not vote.

Pursuant to Section 102.69(a) of the Board's Rules and Regulations, the Employer timely objected to the conduct of the election. On August 9, the Regional Director concluded that the Employer's objections raised substantial and material questions of fact and law and, consequently, ordered a hearing.

The matter was heard on September 28.² On November 3, the hearing officer issued her Report, to which the Employer has timely filed these exceptions.

III. FACTS

The Employer generally has no objection to the hearing officer's findings of fact and credibility resolutions. Those findings are summarized below.

The Region scheduled two voting periods for July 21 in the Employer's break room. (Report 5.) The first voting period was scheduled from 5:30 a.m. to 8:30 a.m., and the second period from 4:00 p.m. to 8:00 p.m. (Report 5.) The Board agent began the pre-election conference for the first voting period at 5:00 a.m. (Report 5.) Attending the conference were the Employer's attorney, Michael Carrouth, two of the Employer's managers, Earl McConnell and Fred Greaves, the Employer's designated observer, Charetta Robinson, and the Union's designated observer, Thometra Robinson-Marks. (Report 5-6.)

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² The matter was originally heard in its entirety on August 20, but the court reporter for that hearing informed the Region that his equipment case, which contained the exhibits and recordings of the hearing, was stolen from his vehicle. Consequently, the Regional Director ordered a second hearing. (Report 2.)

After the conference, the Board agent looked at her watch and announced the time as being 5:20 a.m. (Report 6.) The Employer's attorney immediately notified the agent that her watch was five minutes faster than the employee time clock located directly outside the door to the break room. (Report 6.) The Board agent insisted that her watch was the official timepiece and declined to adjust it to be consistent with the employee time clock. (Report 6.) Once the Board agent designated her watch as the official timepiece, the Employer's observer changed her digital watch to be consistent with the Board agent's watch. (Report 7.)

At approximately 7:30 a.m., a motorcycle accident occurred near the Employer's facility. (Report 8.) One of the Employer's manager witnesses testified that a supervisor informed him that employees had called in stating they had a hard time getting to work because of lanes being blocked due to the accident. (Report 8.)

At 8:27 a.m., according to the Board agent's watch (8:22 a.m. according to the employee time clock), the Board agent commented that things were "slow" and she was going to begin taking down the election equipment, including the three-sided election booth. (Report 7.) At 8:29 a.m., according to the Board agent's watch (8:24 a.m. according to the employee time clock), three eligible voters, Patrick Bush, Mark Brandon, and Lauren Parker, arrived to vote, but the Board agent informed them they could only vote subject to challenge or return and vote during the second voting period. (Report 7.) The three employees left the voting area before 8:30 a.m., according to the Board agent's watch (8:25 according to the employee time clock), without voting at that time. (Report 7.) Both observers testified that they were unaware whether any other potential voters were in the hallway outside the break room when the three employees arrived and were turned away by the Board agent. (Report 8.)

The Employer's attorney and managers returned to the break room at 8:32 a.m., according to the employee time clock. (Report 8.) The Board agent explained to the group that three employees arrived to vote after the polls were closed, and she told them they could vote subject to challenge or return and vote during the afternoon voting period. (Report 8.) The Employer's attorney questioned the Board agent's actions in instructing the three employees to vote subject to challenge or return during the second voting period, referring to his earlier objection to the Board agent's refusal to adjust her watch to coincide with the employee time clock. (Report 8-9.)

During the pre-election conference for the second voting period, the Board agent announced that she had changed her watch to be consistent with the employee time clock. (Report 9.) The second session proceeded without incident. Bush, Brandon, and Parker voted during the second session. (Report 9.)

IV. OBJECTIONS

The Employer filed three objections to the conduct of the July 21 election. The first objection was to the Board agent's conduct in closing the polls early during the first voting session. The second objection was to the Board agent's conduct in turning away three eligible voters before the polls were scheduled to close. The third objection was to the Board agent's failure to follow the NLRB Casehandling Manual in closing the polls early and in turning away three eligible voters. The hearing officer recommends that the Board overrule all three of the Employer's objections.

V. EXCEPTIONS

The hearing officer found as a matter of fact that the Board agent closed the polls of the first voting session early and turned away three eligible voters. (Report 14.) The hearing officer

further found that "the Board agent deviated from Section 11324 of the CHM by closing the polls early . . ." (Report 19.) The Employer agrees with these findings. However, the Employer takes exception to the hearing officer's conclusion that the Board agent's improper conduct was not sufficient to affect the outcome of the election.³

A. Wolverine Dispatch establishes the standard for determining whether an election should be set aside when polls are improperly closed.

The Board in *Wolverine Dispatch, Inc.*, 321 NLRB 796, 797 (1996), held that "the proper standard" for determining if an election should be set aside where polls are not open when scheduled is "whether the number of employees possibly disenfranchised thereby is sufficient to affect the election outcome, not whether that number of voters, or any voters at all, were *actually* disenfranchised." The Board agent conducting the election in *Wolverine Dispatch* closed the polls "for only a few minutes" during a scheduled voting session. Id. at 796. There were 34 eligible voters, and the employer lost the election by a vote of 15-11 (excluding four challenged votes). Ibid. Thus, four eligible voters did not vote, and that number was sufficient to affect the outcome of the election. Ibid.

According to the Board, "Although the polls were closed for only a few minutes, it is possible that four eligible voters arrived at the polling area to vote during this hiatus, found no one present, and departed unnoticed by the Board agent or the observer." Id. at 796-797. In so finding, the Board "reject[ed] the hearing officer's rationale that setting aside the election is not warranted because the evidence does not affirmatively demonstrate that any employees were

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³ While the Board agent's conduct in turning away three eligible voters at a time when the polls should have been open was improper and certainly could have disenfranchised those three employees, the Employer acknowledges there is no evidence to suggest those three employees did not return and vote during the second session. Consequently, the Employer takes no exception to the hearing officer's finding that the three employees who were turned away were not disenfranchised by the Board agent's conduct. Nevertheless, the Employer maintains its position that the Board agent's conduct in turning away the three employees (and in closing the polls early) possibly disenfranchised one or more of the 20 eligible voters who did not vote.

disenfranchised." *Wolverine Dispatch*, above at 797. The Board observed, "this objective standard is necessary to preserve the integrity of the election process." Ibid.

In concluding that the results of the election were affected by the improper poll closure, the *Wolverine Dispatch* Board distinguished three earlier Board decisions relied on by the hearing officer in the case. The Board explained that in *Kirsch Drapery Hardware*, 299 NLRB 363 (1990), *Celotex Corp.*, 266 NLRB 802 (1983), and *Jim Kraut Chevrolet*, 240 NLRB 460 (1979), the late opening of the polls did not warrant setting the elections aside because the evidence reflected that all eligible voters had voted. Ibid. In *Wolverine Dispatch*, on the other hand, four eligible voters did not vote, and the employer lost the election by three votes. Ibid. Thus, the Board held, "the number of employees possibly disenfranchised . . . was sufficient to affect the election result" Ibid.

B. The hearing officer failed to apply the objective standard adopted in *Wolverine Dispatch*.

In this case, the hearing officer found that the Board agent improperly closed the first voting session of the July 21 election early and turned away three eligible voters before the polls were scheduled to close. The tally of ballots revealed that 30 employees voted for the Union, 29 employees voted against it, and 20 employees did not vote. Thus, because the Board agent's conduct was improper and could have disenfranchised voters, the relevant inquiry under *Wolverine Dispatch* is whether 20 votes is sufficient to affect the outcome of the election. Given that the Employer lost by a mere one vote, there can be no dispute that it was. Consequently, the election should be set aside.

Notwithstanding the clear line of Board precedent on this issue, the hearing officer improperly imposed on the Employer the burden of proving that at least one of the 20 employees who did not vote failed to do so because the Board agent closed the polls early or turned away

three eligible voters before the polls were scheduled to close. In other words, the hearing officer focused on whether any of the 20 employees were *actually* disenfranchised, rather than whether any of them were *possibly* disenfranchised. This analysis is a misapplication of the Board's objective standard set forth in *Wolverine Dispatch*.

The hearing officer's Report plainly demonstrates that she failed to apply the Board's objective standard. According to the hearing officer, "There is no record testimony or other documentary evidence that any voters overheard the Board agent's instructions to [the three employees who were turned away] or that any conversations among the three voters and other potential voters took place." (Report 16.) The hearing officer further explained, "There is no evidence there were even employees present in the hallway at the time [the three employees who were turned away] were in the break room, or after they left the break room." (Report 16.)

Contrary to the hearing officer's position, the Employer need not produce evidence that voters overheard the Board agent's instructions or that employees were in the hallway at the time. Because 20 eligible voters did not vote in the election and the Employer lost by one vote, the presumption under *Wolverine Dispatch* is that at least one of those scenarios *could* have happened as a result of the Board agent's conduct in closing the polls early and turning away three eligible voters before the polls were scheduled to close.

The hearing officer suggests that the Employer should have obtained after-the-fact statements to meet the subjective standard she applies. For instance, the hearing officer opined, "The Employer could have investigated with [one of the three employees who was turned away] whether there were any employees in the hall at the time he left the polling area, or whether he had any conversation with voters after he left the first session." (Report 16-17.) This activity is precisely what the Board sought to avoid by establishing the "objective standard" in *Wolverine*

Dispatch. The Board obviously does not want employers asking employees who they saw in the voting area and if they will support the employer's position with an affidavit or testimony at a hearing. Indeed, the burden imposed on a union of having to solicit and produce such evidence if election results are not in their favor would be at least as onerous as the burden that would be imposed on an employer. Again, an objective standard is necessary to avoid these types of issues and "preserve the integrity of the election process." Wolverine Dispatch, above.

In *Pea Ridge Iron Ore Co.*, 335 NLRB 161 (2001), the Board specifically rejected the Regional Director's reliance on after-the-fact statements as to whether employees were actually disenfranchised. In that case, the Board ordered a new election where a voting session was opened seven minutes late, five eligible voters did not vote, and the employer lost the election by one vote. Ibid. In the course of investigating the employer's objections to the election, the Regional Director solicited statements from the five employees who did not vote as to their reasons for not voting. Ibid. Three of the employees reported being out of town on the day of the election, a fourth was unavailable because of a medical emergency, and a fifth simply elected not to vote. Ibid. None of the five employees indicated that their failure to vote was caused by the seven-minute delay in the polls being opened. Ibid. Consequently, the Regional Director concluded that no eligible voter was possibly disenfranchised by the late opening of the polls. Ibid.

Citing, inter alia, *Wolverine Dispatch*, the Board reversed the Regional Director's decision and set aside the election. Ibid. According to the Board, the Regional Director erred in relying on "after-the-fact statements obtained from eligible voters as to the reasons why they did not vote in an election." Ibid. The Board reiterated that the "objective standard not only

safeguards the choice of the majority of employees voting in the election, but also is necessary to protect the integrity of the election process itself." *Pea Ridge*, above.

Although in the instant case the hearing officer does not suggest the Employer should have produced evidence from the 20 eligible employees who did not vote as to the reasons why they did not vote, she does imply the Employer should have produced evidence that at least one of those employees was present at the time the Board agent improperly closed the polls early and turned away three eligible voters. The Board, however, has recently reaffirmed its position that evidence concerning whether non-voting employees actually appeared at the election is immaterial under the objective standard.

Affirming as a three-member panel a two-member panel unpublished order issued on January 9, 2008, the Board in *Environmental Maintenance Solutions*, 355 NLRB No. 58, slip op. at 1 (2010), agreed with the ALJ's finding that the late opening of the polls did not affect the outcome of the election. In doing so, however, the Board rejected the ALJ's reliance on testimony that no eligible voters arrived to vote between the scheduled and actual times for the opening of the polls. Id. at 1 fn. 3. Instead, the Board found the election was not affected because the number of eligible non-voters (9) could not overcome the union's 13-vote margin of victory. Ibid. Here, in contrast, the number of eligible non-voters (20) *could* overcome the Union's one-vote margin of victory.

The hearing officer's finding that "the Employer rests its arguments entirely on speculation," (Report 16), highlights the fallacy of her analysis. In *Wolverine Dispatch*, there was absolutely no evidence that the four employees who did not vote in the election attempted to vote during the "few minutes" the polls were not open when they should have been. *Wolverine Dispatch*, above at 796. Yet, applying an objective standard, the Board relied on pure

speculation when it concluded that "it is possible that four eligible voters arrived at the polling area to vote during this hiatus, found no one present, and departed unnoticed by the Board agent or the observer." *Wolverine Dispatch*, above at 797. This case falls squarely in line with *Wolverine Dispatch*.

As the hearing officer found, "The Employer maintains it is *possible* voters were in the hallway outside the break room, that those voters *may* have overheard the Board agent's instructions to [the three employees who were turned away], and that conversations about the polls being closed *may* have occurred among [the three employees who were turned away] and other potential voters who *may* have been in the hallway or in the bay." (Report 16.) While the hearing officer suggests such circumstances are "untenable," (Report 16), she does not affirmatively find they are impossible.

Accordingly, because the number of "possibly disenfranchised" voters is sufficient to affect the outcome of the election, *Wolverine Dispatch* warrants setting the election aside. To do otherwise requires the Board to overturn well-established precedent.

C. The hearing officer's attempt to distinguish *Wolverine Dispatch* and related Board decisions is unavailing.

In her Report, the hearing officer attempts to distinguish *Wolverine Dispatch*, *Pea Ridge*, and another case, *B & B Better Baked Foods, Inc.*, 208 NLRB 493 (1974), because in those cases, "the Board agent was completely absent from the polling locations, making it impossible to determine whether any voters would, or could, have attempted to vote," while in this case, "the Board agent was present at the polling location during the whole first session." (Report 19.) The hearing officer notes a distinction without difference. While the Board agent in this case remained at the polls, she was not in the hallway or in the bay area to see whether the three employees she refused to allow to vote before the polls were scheduled to close informed any of

the 20 eligible non-voters on their way to vote that the polls were already closed, thereby disenfranchising their vote.

Moreover, the hearing officer's attempt to distinguish this case from *Wolverine Dispatch*, *Pea Ridge*, and *B & B Better Baked Foods* on the basis of the Board agents' presence at the polls during the improper closing ignores cases in which the Board has set aside elections despite the Board agents' presence at the time of the misconduct. See, e.g., *Kerona Plastics Extrusion Company*, 196 NLRB 1120 (1972) (setting aside election where the Board agent's mistake in closing morning session polls 20 minutes early was "made in the presence of employees waiting to vote" and therefore could have affected votes cast in the afternoon session); *Repcal Brass Manufacturing Company*, 109 NLRB 4 (1954) (setting election aside where Board agent closed polls 1½ to 2 minutes early and turned away at least one voter).

Accordingly, the hearing officer's attempt to distinguish *Wolverine Dispatch* and its progeny can easily be discounted.

D. The decisions on which the hearing officer relies to justify her conclusions are distinguishable from the instant case.

The hearing officer cites a number of cases that are easily distinguishable from the one at bar. For example, the hearing officer's reliance on *J.C. Brock, Corp.*, 318 NLRB 403 (1995), *Newport News Shipbuilding & Dry Dock Co.*, 243 NLRB 99 (1979), and *Pride Motor* [sic] *Products, Inc.*, 233 NLRB 182 (1977), for the proposition that "the Board has rejected mere speculation when considering whether election standards have been impugned or violated" is misplaced. (Report 17.) First, none of those three cases involved an election poll being closed when it was scheduled to be open.⁴ Second, all three of those cases were decided before

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⁴ The employer in *J.C. Brock* challenged the election on the ground that the use of separate ballots in English and Vietnamese created a doubt about the fairness and validity of the election process. *J.C. Brock, Corp.*, 318 NLRB at 403. The employer in *Newport News Shipbuilding* challenged the election on the ground of an alleged chain voting

Wolverine Dispatch. Third, in J.C. Brock and Pride Made Products, the Board found that the number of voters possibly disenfranchised by the misconduct was not sufficient to affect the outcome of the election. See J.C. Brock, Corp., above at 403; Pride Made Products, Inc., above at 182. Finally, the principal issue in Newport News Shipbuilding (which involved an election among 17,000 employees) was whether election misconduct actually took place; the Board did not address whether employees were or could have been disenfranchised by the alleged misconduct. See Newport News Shipbuilding & Dry Dock Co., above at 99.

The hearing officer also relies unconvincingly on *Colgate Scaffolding & Equipment Corp.*, 254 NLRB No. 76, slip op. at 1 (2009), for the proposition that "whether a voter was possibly disenfranchised[] is not a 'per se' finding, but requires some assessment of the possible affect of the irregularity on the voter." (Report 16.) In *Colgate Scaffolding*, the Board refused to set aside an election because the evidence revealed that the one employee who did not vote was out of the country at the time, and thus, the delay in opening the polls could not have possibly excluded the employee from voting. Ibid. The Board explained, "the Board may conclude from objective evidence that the failure of a dispositive number of individuals to vote was not caused by an unscheduled poll closure, and that the closure was consequently harmless." Ibid. Here, there is no evidence that any of the 20 non-voters were out of town or otherwise unavailable to vote on July 21.

In sum, the instant case is distinguishable from *Kirsch Drapery*, *Celotex Corp.*, and *Jim Kraut Chevrolet* (all distinguished in *Wolverine Dispatch*) because not every eligible voter in this case voted. It is distinguishable from *Environmental Maintenance* because the number of eligible voters possibly disenfranchised is sufficient to affect the outcome of the election. And it

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scheme. Newport News Shipbuilding & Dry Dock Co., 243 NLRB at 99. The employer in Pride Made Products challenged the election on the ground that an employee left the voting booth with her ballot and allegedly showed it to eligible voters standing outside. Pride Made Products, Inc., 233 NLRB at 182.

is distinguishable from *Colgate Scaffolding* because there is no evidence that the 20 eligible employees who did not vote were out of the country or otherwise unavailable on the day of the election.

VI. CONCLUSION

While the hearing officer appropriately found that the Board agent improperly closed the polls early on July 21 and turned away three eligible voters at a time when the polls should have been open, she applied the wrong standard in concluding that the results of the election were not affected thereby. The hearing officer would require the Employer to meet with employees and engage in after-the-fact discussions – the exact conduct the Board sought to avoid by establishing an objective standard. To accept the hearing officer's rationale would directly contravene the principles in *Wolverine Dispatch*. An objective approach to resolving challenges to improper poll closings best safeguards the choice of a majority of employees voting in the election and is necessary to protect the integrity of the election process.

Because the Board agent improperly closed the polls early and turned away three eligible voters, and given that 20 eligible employees did not vote in the election and the Employer lost by only one vote, the Board should sustain the Employer's objections and order that the election be set aside and a new one held.

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Respectfully submitted,

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Dated this 17th day of November 2010.

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CERTIFICATE OF SERVICE

Pursuant to Section 102.69(j)(2) of the Board's Rules and Regulations, I hereby certify that I have, on this 17th day of November 2010, e-filed the foregoing EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS AND RECOMMENDATIONS with the Office of the Executive Secretary and caused it to be served upon the following individuals via email:

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s/ Stephen C. Mitchell
For Fisher & Phillips LLP